

Lakewood Mechanical Contractors, Inc. and Thomas R. Church, Case 30-CA-5870

February 12, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND
MEMBERS FANNING AND HUNTER

On September 8, 1981, Administrative Law Judge Wallace H. Nations issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief. The General Counsel filed a motion to strike, and Respondent filed an objection to the motion.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions, briefs, motion and objection, and has decided to affirm the rulings, findings,¹ and conclusions² of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

¹ The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings. We also find no merit to the General Counsel's request for *de novo* review of the record or in the motion to strike, and deny them.

In sec. III.(A).(1), par. 4, of his Decision, the Administrative Law Judge inadvertently stated that Charging Party Church quit his employment with Respondent in May 1978. The correct time is May 1979, and the Decision is corrected accordingly.

² We agree with the Administrative Law Judge's conclusion that Respondent did not interrogate employee Schoeneck in violation of Sec. 8(a)(1) of the Act, since we find that in the circumstances of this case Respondent's conduct did not reasonably tend to interfere with the free exercise of employee rights under the Act.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge: Upon a charge brought by Thomas Church on June 2, 1980, a complaint was issued on July 31, 1980, alleging that Lakewood Mechanical Contractors, Inc. (herein Re-

spondent), violated Section 8(a)(1) and (3) of the Act by interrogating and coercing employee Church in middle to early March 1980, concerning his protected concerted activities and by discharging Church on or about March 23, 1980. In addition, on brief, the General Counsel asserts that the facts established that Respondent illegally interrogated employee Hugo Schoeneck concerning his sympathies concerning protected activities in violation of Section 8(a)(1) of the Act. Respondent's answer denies these allegations. A hearing was held on April 23-25, 1981, at Rhinelander, Wisconsin. Briefs were received from both Respondent and the General Counsel on or about May 29, 1981.

Upon the entire record in this case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF THE RESPONDENT

Respondent is engaged, among other things, in the construction of sewer and water lines with its principal place of business in Rhinelander, Wisconsin. Respondent, in its answer, admits that it is an employer within the meaning of the Act and that it is engaged in a requisite amount of interstate commerce.

II. THE LABOR ORGANIZATION INVOLVED

International Union of Operating Engineers, Local Union No. 139, referred to as the Union, is a labor organization within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Allegations Relating to Respondent's Interrogation and Discharge or Refusal To Rehire Church in March 1980

1. Background

Respondent, based in Rhinelander, Wisconsin, is run by John A. Taylor, chairman of the board, and his two sons, Gary Taylor and Tom Taylor. The Charging Party, Church, was a boyhood friend of Tom Taylor, their friendship extending back to high school days when they were best friends. Church has had a history of difficulties both with the legal authorities and with his own family, and through his friendship with Tom and John Taylor, was given assistance over the years with his problems. Through his friendship with Tom and other members of the Taylor family, Church secured employment with Respondent, working primarily with his best friend, Tom. At times when Church had problems at work he would go to Tom to have those problems straightened out.

Prior to May 1979, Respondent did not have a collective-bargaining agreement with the Union. In May 1979, Respondent was working on a project in Michigan referred to as the Bates project. Church was employed on that project as an operating engineer. Respondent entered into a collective-bargaining agreement with the International Union of Operating Engineers, Local No.

324, covering the Bates Project in Michigan, and Local Union No. 139 covering most of Wisconsin. The collective-bargaining agreement, under article 2, contains a union security provision requiring all employees within the jurisdiction of the agreement to become union members and maintain such membership.

In May 1979, John Taylor informed Church that the union contracts had been signed making Church unhappy because he did not want to join the Union.

While Church was on the Bates job, he was contacted by David Waite, the business representative for the Union. During that conversation, Church made it clear that he did not want to join the Union, but nonetheless was persuaded to fill out an application for membership. The application also required the payment of an initiation fee of \$302. However, at that time, Church only paid the sum of \$5 and agreed to pay the remainder shortly thereafter. Waite testified that he heard nothing further from Church until approximately January 1980. Church, however, claimed to have contacted Waite on numerous occasions regarding his health benefits in August 1979. In any event, Church did not pay his initiation fee to the Union and became a member in good standing with the Union until August 27, 1979.¹ Because of his dissatisfaction with pay provisions on the Bates job, Church quit his employment with Lakewood in May 1978.

Almost immediately, Church was rehired and put to work on very small jobs by Tom Taylor, and ultimately put to work on a project at Lac du Flambeau. That job was on an Indian reservation and apparently the Union had little jurisdiction in the area and thus Church was able to avoid fully joining the Union. During the months of May, June, July, and August, Judith Cook, the payroll clerk for Lakewood, understood that Church had not joined the Union and therefore (mistakenly) concluded that vacation benefits were not to be deducted from his check, and payments to the union fringe benefit fund were not to be made for Church. When Cook was advised in September 1979 that Church had joined the Union, she began reporting and paying fringe benefits for

Church. This coincides with the time that Church finally paid his initiation fee. Church's payment of the initiation fee which authorizes the receipt of health and insurance coverage coincides with the day when Church first learned his wife was pregnant.

In January 1980, Church contacted John Taylor, advising him that his wife was pregnant, and expressed concern over whether she was covered under the union insurance policy. He also expressed concern about having to pay insurance premiums through an expected layoff period because the minimum number of hours had not been reported for him under the fringe fund provisions over the past year. John advised that he would look into it and thereafter check with Cook, the payroll clerk, to determine if fringes had not been paid during the summer of 1979, when Church claimed not to be a member of the Union. John Taylor then personally contacted Waite, advised him of the potential problem, and learned that benefits were supposed to be paid whether or not employees were members of the Union. Thereafter, on February 27, 1980, Waite came into the offices of Lakewood. Cook, Lee Fischer, and Waite reviewed the payroll records to determine the hours Church worked in the months of May, June, July, and August 1979, and what fringe payments were owing. The amount involved was approximately \$1,300. In addition, it was determined that there were two other employees for whom fringes had not been paid, and Lakewood also paid those fringes. These two employees are still actively in the employ of Respondent. Cook then prepared a report form for submission to the fringe fund. Thereafter, checks were drawn for payment of fringe funds, and sent in with the report to the Union. As suggested by Waite, on February 27, 1980, the report was sent in on March 5, 1980, along with the regular monthly report. The testimony is undisputed that there was no controversy of any kind over the payment of the fringe funds for the missed months in the summer of 1979.²

During the months of January and February and the early part of March 1980, Church was employed by Lakewood on a part-time basis (6 hours a week) in order to obtain extra income while drawing unemployment benefits. The construction business in northern Wisconsin is seasonal and virtually all the construction employees are laid off during the winter months. This sporadic work afforded Church continued through March 20,

¹ At points in the General Counsel's brief, it is urged that Church was a full union member as early as May 1979, which would cast doubt on Respondent's defense that it honestly did not believe health benefit payments for Church should be made on Church's behalf for the summer months of 1979. I find that the Company did not believe Church to be a union member until August or September 1979, for the reason that Church led them to believe that this was the fact. Little of the testimony is actually in conflict, only shadings or implications that can be drawn therefrom. In those few instances where implications favorable to either Church or Respondent could be drawn from the facts and no clear path is shown from surrounding evidence, I have credited Respondent's version. In my view, Church's credibility was severely strained by his cavalier attitude toward his supposed employer at the time of this hearing. On the first day of the hearing, Church testified that he had found employment in 1980 with a local insurance agency through a friendship he had made with the agency's owner. He stated that he had quit his job about 3 days prior to the hearing and had gone to work for a competitor. The General Counsel called as a witness the owner of Church's previous employer who, after relating how Church was hired by him as a result of a social friendship, was shocked to be confronted with the fact that Church was presently employed by a competitor, in violation of Church's employment contract. This action by Church, as well as the demeanor of Church in comparison with that of John Taylor, Respondent's chief witness, constitutes the reasons for my crediting Respondent's version of the facts.

² Tom Church testified that on or about February 28, 1980, he went to see Tom Taylor at his office. Tom was sitting behind his desk looking at a paper containing Church's name and some hours. Upon being asked what the paper was about, Church stated that Tom Taylor "slung" the paper across the desk and said, "This is going to cost the company \$1,300." Church stated that the tone of voice used by Tom was an angry one. As far as I can determine from the record, this is the only evidence of anyone with management at Lakewood being the least bit upset about having to pay health benefits on behalf of Church or the two other employees for whom such payments were inadvertently not timely made. In light of the concern shown by the Company's owner, John Taylor, about the welfare of Church's wife who was pregnant at the time and his seeing to it that Church could draw unemployment compensation during the winter slack season in the Wisconsin construction trade, this alleged outburst over \$1,300 seems uncharacteristic of the Company's attitude toward payment of the health benefits, as demonstrated by all the other evidence in the record. Accordingly, I accord this alleged confrontation little weight in this Decision.

1980. During January 1980, Church was given a free trip to Florida by Respondent as a bonus for finishing a job in the fall of 1979, within an allotted time. In March 1980, when work on the company's projects recommenced, the first project was the Suamico Project and the foreman on that project was Anthony Gardas. With respect to this job, and as will be discussed in more detail at a later point in this Decision, John Taylor informed Church that he would no longer be employed as a backhoe operator on Respondent's projects unless requested by one of the foremen on the particular project.³

Following this notification by John Taylor on or about March 28, and realizing that he would not be taken off layoff status and put on the Suamico job unless picked by a foreman, Church wrote to his union representative, David Waite, claiming that he had been terminated. In that letter Church stated that "I cannot understand for what reason I was fired." He also stated that "I have been advised by legal counsel that the terms of our contract have been violated." In this letter Church specifically made reference to notices required to be given him by the various provisions of the collective-bargaining agreement.

Waite thereupon conducted an investigation of the matter and advised Lakewood that, according to the collective-bargaining agreement, it should have given Church a formal layoff notice. Accordingly, on April 11, 1980, a layoff notice was sent to Church, advising him of his layoff status as of January 25, 1980, the date on which Church began his layoff, applied for unemployment compensation benefits, and began drawing benefits.

After Waite had contacted Lakewood, reviewed records, determined that Church was collecting unemployment, and investigated the circumstances surrounding Church's claim that he had been fired, he contacted Church by telephone on April 6, 1980, and explained to Church the difference between being fired and being on layoff status. Thereafter, on May 4, 1980, Church wrote a subsequent letter, in which he alleged he had been discharged because he pursued health benefits. According to Waite, prior to the receipt of this letter, he had no recollection of Church ever claiming he had been discharged because he pursued health benefits.

2. Contentions and conclusions

Based on the foregoing facts, the General Counsel contends that Respondent has violated Section 8(a)(1) and (3) of the Act by either discharging or refusing to rehire Church because of his concerted activities, i.e., pursuing his health benefits. The General Counsel also relies on an incident in late February 1980, when Church mentioned a meeting with Tom Taylor and Hugo Schoeneck, saying that Schoeneck should be paid more money. Church based his views in this regard on information he had obtained from the union work hall. Un-

known to Church, the Company had already raised Schoeneck's salary. At the meeting, on or about March 28, 1980, when Church was advised that he would no longer be hired unless selected by a foreman, John Taylor asked Church why he advised Schoeneck that he was not being paid properly, and always tried to make John look like Jesse James.⁴ The General Counsel asserts that John Taylor's anger over Church's mistaken activity on behalf of Schoeneck formed a part of the basis for the Company's decision to refuse to rehire Church in violation of the Act.

Because of the timing of the events involved, one could infer Church's pursuit of his health benefits and action on behalf of co-employee Schoeneck were motivating or triggering factors in the Company's decision not to bring Church off layoff status.

However, Respondent offered a convincing defense that I believe establishes that it would have taken the action that it did with regard to Church even if Church had not sought health benefits and questioned Schoeneck's pay. As noted heretofore, Church enjoyed, for most of his life, a special and close relationship with the Taylors. Indeed, the evidence reflects that Church was the best friend of the owner's son, Tom Taylor. Because of this friendship Church was, for most of his employment with Respondent, afforded a status within the company not called for by his job level. It appears that, on most jobs on which Church worked, Tom was the project supervisor or, at least, in an intermediate supervisory role between Church and whoever was project supervisor.

Evidently, Tom knowingly allowed Church to perform his backhoe duties in any manner which Church desired. From a technical standpoint Church was an adequate backhoe operator. However, other than having an ability to take direction and orders from Tom Taylor, Church was apparently unable to satisfactorily take orders or directions from any other foreman or supervisor in the Company. Church's problem in this regard was summed up by Schoeneck who described Church's on-the-job personality as follows:

Q. I'll start you out where we left off. I—I asked you how he reacted when he would get an order from a foreman, or otherwise disagreed with somebody on the job.

A. If it doesn't go the way he wants, then he gets a little hyper. I'll use that. And then he starts doing things, shortcuts, and things like that.

Q. . . . Yeah. You said when things were going his way or he was doing things the way he wanted to, he was fine; but if he was aggravated or someone gave him orders, then he would react in an en-

³ The undisputed evidence reflects that it is an industry practice in the involved area for foremen to select their backhoe operators. The record is not clear about Respondent's general practice in this regard prior to 1981. As far as Church is concerned, he was evidently placed on crews by Tom Taylor without regard to the wishes of the crew foremen. Tom Taylor was in an immediate supervisory status on virtually all the projects on which Church was employed.

⁴ A short time prior to this meeting, Church had talked to John Taylor's nephew, Paul Taylor, and Respondent's foreman, James Zarm, about the delay in the Company paying \$1,300 in the Union's health fund on Church's behalf. Church said moneys were deducted from his check, and it was as though Respondent had its hand in the gas station "till." It appears from the record that John Taylor's reference to being made to look like Jesse James may have related to this conversation, to the Schoeneck incident, or both.

tirely different way. If—if I understand your answer.

And I'm asking you, can you just describe what you mean by reacting in an entirely different way? Did he become angry?

A. He just—he—yes. He—he just changes. I don't know. It's just like, I don't have to do it that way because I know, I'm Tom Church, and Tom Church has done it this way and he's done it and I'm going to do it that way. I'll do it my way and throw sand over here and throw it that way. What else can I say? I don't know how much you want me to go into it.

Church's inability to get along with foremen is undisputed. The General Counsel urges that part of this problem is the quality of foremen employed by Respondent. For example, one of the Company's foremen, Terrance Mancl, had significant problems with Church on a project in the fall of 1979. As a result of these problems, a portion of the project on which Church and Mancl were working in an employee-foreman relationship was not finished in a timely fashion. Mancl also developed a drinking problem on this job and was either fired or voluntarily resigned. Another supervisor replaced him and also had difficulty with Church. This foreman, Wayne Lewis, is a mathematician who was evidently made foreman because of his educational background, although he had little experience in construction work. The General Counsel would infer that this lack of experience was at least part of the reason for his inability to deal with Church. However, no matter what fault one might find in the record that could have been laid at the feet of Respondent's foremen one cannot escape the fact that virtually every foreman under whom Church worked had extraordinary difficulty in supervising him.

To explain fully the timing of Respondent's change in attitude toward Church, John Taylor testified that, in 1979, Lakewood had a lot of work and had need of a number of skilled men. At times, Respondent had as many as 100 to 120 people working for it. During the winter of 1979-80, John Taylor reviewed the past year's performance, noting that the crew run by Mancl had the best production on the Clover project immediately preceding the fall 1979, Oxford project. Yet, when Mancl went to Oxford with the same crew (with the only difference being Church was added on as the operator) the production was drastically reduced. In trying to determine why the production decreased, John Taylor learned through his superintendent, James Gust, that the foremen were having severe problems with Church and that the problems stemmed from one set of rules for Church and one set of rules for everyone else. In fact, Gust quit and Mancl either quit or was fired from Lakewood, at least in part, because of the preferential treatment given Church and their resulting inability to control or direct the work of Church.

The General Counsel asserts that the problem stemmed from Tom Taylor's apparent grant of authority to Church to supersede the direction of his supervisors and foremen. That may well be the case. However, as a result of his review of his crews' performance, John

Taylor determined that, from that time forward, Church was to be treated like every other employee and he was to be selected for crews in the same manner as was followed for other employees at Lakewood. Thus, Church was put on a project under the procedure followed throughout the industry, and as was expected under the collective-bargaining agreement covering Church and the other employees. As John Taylor stated:

I was going to let the foreman be the foreman on the crew, pick his own crew, so much as possible, and especially his own operator. And I was going to have a chain of command which I had before that wasn't followed, with a foreman reporting to the superintendent, the superintendent reporting to the office. I did not want people coming out of the crew straight into the office clear around everyone. And they were going to follow that with no interference and no meddling from anyone.

In the spring of 1980, when work on projects recommenced, the first project was the Suamico project and the foreman on that project was Anthony Gardas. As Gardas testified, he selected his operator for Suamico in putting together a crew in the spring at the startup. He testified that he was free to select Tom Church or any other operator. His reason for not selecting Church was because he was aware of Church's inability to get along with and take orders from other foremen.

Upon learning that he was not to be put on the Suamico job, Church went to the offices of Lakewood, on or about March 28, 1980, and engaged in conversation with John Taylor. Later, at a meeting at Lakewood offices, John Taylor made it clear to Church what his problem was:

I told Tom Church in my office that if a foreman picked him out I would put him on the job. I was not going to place him on a job and in particular not on a job with Tom Taylor unless the foreman had picked him. And I said, I've talked to all of these foremen. And I said, in one particular case I asked Fred Felbaab if he would use you down here to make these borings and to run the water and sewer lines for this project. And he told me, no, he didn't care to have Tom on this job. He would rather have Randy Jewel. And so, I sent Randy. And I said to him, Tom, my foremen don't care to work with you, or have you work for them. But either you mend your own fences or go to another contractor. . . . But unless a foreman of mine calls for you, you're not going on a project.

In fact, John Taylor did offer to refer Church to a number of other contractors within the area. Two of Respondent's foremen also confirmed that Lakewood gave them the option to pick Church and put him to work on their crews.

From the evidence, it must be concluded that the decision not to rehire Church was that of John Taylor and John Taylor alone. Although the timing is such that one might infer that Church's pursuit of health benefits

played a role in his decision not to rehire Church absent a request from a foreman, nothing else in the evidence would bear this out. Respondent's giving a free trip to Church after it became aware of his pursuit of health benefits and its continued giving to Church the maximum hours of work compatible with drawing unemployment benefits long after this pursuit came to their knowledge would belie the inference that John Taylor was in any manner upset about Church's quest. More questionable is John Taylor's reaction to Church's suggesting in front of Schoeneck and Tom Taylor that Schoeneck should be paid more by Respondent when in fact, a raise had already been given, and Church's comments to fellow employees that Respondent had its hand in the "till." The simple fact that these matters were brought up at the meeting where Church was made aware that he was not being recalled absent a foreman's request would indicate that they had in fact, to some degree, angered John Taylor.

To believe that Church's comments would not anger one in John Taylor's position would defy credulity. He had for years aided Church in a variety of problems in an almost familial relationship. Such irresponsible remarks as those of Church's, uncalled for under the circumstances, would anger or irritate anyone. However, to say that these remarks and the quest for health benefits were the motivating reasons for Respondent's refusal to reinstate Church absent a formal request, I find to be equally incredible. Respondent's business grew substantially in 1979, and offered promise of growth in 1980. I find it entirely reasonable for John Taylor to initiate a review of the 1979 performance and Respondent's problems following the 1979 construction season. The Company's operations were becoming widespread and evidently more difficult to control on a personal basis. That John Taylor found upon review that Church was a problem employee is fully supported by the record. To find that the problem would be best solved by Church's serious attempt to establish a good working relationship with a foreman upon whom he was not forced is entirely reasonable. I find that Respondent would have taken this action, and taken when it did regardless of Church's action regarding his health benefits, his unsolicited attempt to raise Schoeneck's salary, and his unfavorable comments about John Taylor. Accordingly, I find that Respondent's refusal to rehire Church, absent a foreman's request, does not constitute a violation of the Act.

B. Allegations Relating to Respondent's Interrogation of Hugo Schoeneck

As noted above, both Church and Schoeneck testified that they went to Respondent's business office to talk to Tom Taylor in order to ascertain whether Schoeneck would be receiving room and board for operator schooling. After Tom Taylor answered affirmatively, Church informed Schoeneck that he had talked to persons at the Union hall at Wausau and that Schoeneck should be getting paid more as an apprentice operator. Schoeneck testified that at this time Church did not know that he had already brought his problem concerning low wages to Tom Taylor's attention and that Tom Taylor had given him a raise. So Schoeneck and Tom Taylor merely

shook their heads. Schoeneck, in his affidavit, testified that:

About 2 days later T. Taylor and I went to the root beer stand for food and drink at Taylor's expense. No one else was present. Taylor said: What do you think of what Church was saying the other day? I said, I thought it was a bunch of foolishness. Taylor then said, do you know that Church is taking us to court over some of this stuff? I said, it doesn't have anything to do with me. And Taylor said no.

In testimony at the hearing, Schoeneck affirmed that such a conversation had taken place and that the content of the conversation was as set forth within the affidavit. However, he said that the timing set out in the affidavit was clearly incorrect. The meeting took place approximately in April 1980.

The General Counsel contends that Taylor's questions at the root beer stand constitute interference with the free exercise of Schoeneck's employee rights under the Act. I disagree. The question asked of Schoeneck was almost rhetorical in nature and cannot clearly be related to Schoeneck's request for a raise or Church's request that Schoeneck be given a raise.

I cannot find that the involved conversation would have had any impact upon Schoeneck or any other employee of Lakewood. Accordingly, I conclude that the conversation does not constitute a violation of Section 8(a)(1) of the Act.

For all the reasons set forth above and based upon the entire record in this proceeding, I conclude that Respondent did not violate Section 8(a)(1) or (3) of the Act by discharging or refusing to rehire Church or by any of its conversations with Church. I further find that Respondent did not violate Section 8(a)(1) of the Act by its comments to employee Schoeneck in the course of a conversation with Tom Taylor. Inasmuch as the complaint alleges no other violations of the Act by Respondent, my order will provide for its dismissal.

Upon the foregoing findings of fact and the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not engage in unfair labor practices within the meaning of Section 8(a)(1) or (3) of the Act by discharging or failing to rehire Tom Church, by its conversations with Tom Church, or by its conversation with Hugo Schoeneck.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, as amended, I issue the following recommended:

ORDER⁵

It is hereby ordered that the complaint, and the same is hereby, dismissed.

⁵ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.